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Diplomatic protection

Comments and observations received from Governments

Addendum

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II. Comments and observations received from Governments

General remarks

Belgium

Belgium would like to point out that it views diplomatic protection, in respect of which the International Law Commission adopted on first reading a very useful set of draft articles, as one of a series of mechanisms for the protection of human rights and fundamental freedoms emanating from international treaty law and customary international law, several of which provide for the right of any State to intervene in respect of any individual (including a non-national) whose rights have been violated.

United Kingdom of Great Britain and Northern Ireland

The United Kingdom reiterates its support for the work of the International Law Commission on Diplomatic Protection. There exists a large body of well established State practice on much of the subject matter of the draft articles.

The United Kingdom agrees with the Commission's decision that the present review of diplomatic protection is not an appropriate situation for any review of the functional protection to be accorded to international organizations. The draft articles are intended to be without prejudice to any rights a State may have to exercise consular protection in respect of its nationals abroad; however, we believe that this should be made clearer either in the draft articles themselves or at least in the commentary.

Part one. General provisions

Draft article 1 — Definition and scope

Belgium

Draft article 1 defines diplomatic protection as action by a State adopting in its own right the cause of its national "in respect of an injury to that national arising from an internationally wrongful act of another State". This is a very broad interpretation of diplomatic protection. Belgium proposes that the end of the phrase should read as follows: "in respect of an injury to that national arising from an internationally wrongful act of another State whose international responsibility is therefore formally called into question". This clarification enables States to resort to informal procedures which do not fall within the strict framework of diplomatic protection.

Draft article 2 — Right to exercise diplomatic protection

United Kingdom of Great Britain and Northern Ireland

The United Kingdom welcomes the Commission's characterization of diplomatic protection as a right of the State that the State is under no obligation to exercise. We agree that every State retains the discretion, subject to its internal laws,

as to how this right of diplomatic protection is exercised, if at all. That there is no duty to do so is also made clear in the commentaries to draft articles 2, 3 and 8.

Part two. Nationality

Chapter I. General principles

Draft article 3 — Protection by the State of nationality

United Kingdom of Great Britain and Northern Ireland

Draft article 3 reaffirms the customary international law rule that the State entitled to exercise diplomatic protection is the State of nationality of the injured person. However, the United Kingdom does not agree that the exception to this rule in article 3 (2), discussed further in relation to article 8, reflects customary international law.

(See comments on draft article 2.)

Chapter II. Natural persons

Draft article 4 — State of nationality of a natural person

Belgium

Belgium observes that the draft articles do not require the effective nationality of the claimant State or States, although, pursuant to draft article 7, the nationality of the claimant State must predominate over the accused State in the case of a claim against the State of nationality. While Belgium notes the progress made in this area, particularly with regard to the judgment in the *Nottebohm* case, it fears an increase in "nationality shopping". In order to minimize that risk, the commentary could refer to the right of the accused State to challenge the exercise of diplomatic protection where there is no genuine link of nationality, it being understood that the burden of proof lies with that State.

(See comments on draft article 7.)

United Kingdom of Great Britain and Northern Ireland

Draft article 4 contains the generally accepted bases for conferment of nationality in international law. We agree with the implication of draft article 4 that it is primarily for the State of nationality to determine which individuals it considers to be its nationals in accordance with its own domestic law. Our own rules applying to international claims (see annex) require that the injured party must be a United Kingdom national if the United Kingdom is to present a claim on his or her behalf. However, we do not require an additional "effective link" between the claimant and the State of nationality. We support the Commission's conclusion that the International Court of Justice in the *Nottebohm* case did not intend to establish a rule of general application and that the requirement for an effective or genuine link cannot readily be applied in other situations.

Draft article 5 — Continuous nationality

Belgium

With regard to paragraph 1, and, more specifically, the open question of whether or not nationality has to be retained between injury and presentation of the claim, Belgium takes the view that a lack of continuous nationality does not have any bearing on the right to exercise diplomatic protection provided that the nationality existed at the time of the injury and that it exists (again) when the claim is presented.

Furthermore, Belgium regrets the fact that the question of the relationships between State succession and diplomatic protection was not addressed, even in the commentary on draft articles 5 and 7. Two situations should be discussed:

(a) Cases in which the predecessor State wishes to exercise diplomatic protection in respect of one of its nationals who has involuntarily acquired the nationality of the successor State without having lost the nationality of the predecessor State, provided that the nationality of the predecessor State is predominant;

(b) Cases in which the successor State wishes to exercise diplomatic protection in respect of one of its nationals who has involuntarily retained the nationality of the predecessor State provided that the nationality of the successor State is predominant.

United Kingdom of Great Britain and Northern Ireland

Draft article 5, paragraph 1, is consistent with customary international law in that it requires the claimant to be a national at the date of injury and at the date of presentation of the claim. The United Kingdom's claims rules (see annex) require the individual to be a national continuously from the date of injury up to the date of presentation of the claim; however, in practice it has been sufficient to prove nationality at the date of the injury and at the date of presentation of the claim.

Draft article 5, paragraph 2, would represent a change in existing customary international law provisions. Our own claims rules (see annex) allow the United Kingdom to take up the claim of a national who ceases to be or becomes a national after the date of the injury. Where the United Kingdom decides to bring a claim in such circumstances, it will normally only be brought in concert with the State of former or subsequent nationality. The United Kingdom believes that it is important to maintain the rule on continuous nationality of claims so as to preclude claimants changing their nationality to that of a State which may be more likely to bring a claim on his or her behalf. We therefore welcome the inclusion of the requirements of loss of nationality and acquisition of nationality for reasons unrelated to the claim in draft article 5, paragraph 2, as being necessary to protect against potential manipulation of claims rules by future claimants.

Draft article 6 — Multiple nationality and claim against a third State

Belgium

(See comments on draft articles 4 and 7.)

United Kingdom of Great Britain and Northern Ireland

Draft article 6 provides that where there is dual nationality either State may exercise the right of diplomatic protection against any State other than the other State of nationality. This provision may extend beyond existing customary international law. The United Kingdom may take up the claim of an individual who is a dual national, although in certain circumstances it may be appropriate for the claim to be taken in concert with the other State or States of nationality or to be taken solely by the other State of nationality. The proposed rule differs from our own treaty obligations, including article 5 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws,[1] which allows the State with which the individual is most closely connected to bring the claim. Although not indicative as to the circumstances in which we will exercise diplomatic protection, the United Kingdom will normally only extend consular protection to a dual national in a third State where the individual is travelling using travel documents issued by the United Kingdom.

Draft article 7 — Multiple nationality and claim against a State of nationality

Belgium

Belgium considers that the predominant nationality requirement cannot be satisfied merely by providing proof of its bona fide acquisition, as the commentary on the draft articles appears to suggest by referring to the practice of the United Nations Compensation Commission, which was established by the Security Council to provide for compensation for damages caused by Iraq's occupation of Kuwait. Belgium takes the view that the practice of that Commission is justified by specific considerations that should not be applied wholesale to diplomatic protection. The reference to this practice does not therefore seem appropriate.

(*See comments on draft articles 4 and 5.*)

United Kingdom of Great Britain and Northern Ireland

Draft article 7 sets out a general rule of international law that a State will not support the claim of a dual national against another State of nationality. The Government of the United Kingdom will not normally take up the claim of a national if the respondent State is the State of second nationality. However, exceptionally, the Government may take up the claim of a person against another State of nationality where the respondent State has, in the circumstances leading to the injury, treated that person as a British national. However, we consider that the test for "predominant nationality" included in draft article 7 requires further clarification.

[1] See League of Nations, *Treaty Series*, vol. 179.

Draft article 8 — Stateless persons and refugees

Belgium

Belgium is of the opinion that the concept of "refugee" should have the meaning assigned to it by international law.

With regard to paragraph 3 and in keeping with its comment on draft article 1, Belgium considers that, if the broad interpretation of diplomatic protection is to be retained, this paragraph should be deleted in order to allow for certain informal remedies against the State of nationality of the refugee. Otherwise, paragraph 3 creates an unjustified distinction between refugees in the State of residence and nationals of that State. In addition, the State whose protection is requested remains free to decide whether or not to grant it.

United Kingdom of Great Britain and Northern Ireland

In relation to draft article 8, the protection of stateless persons and refugees is not a matter which we regard as falling within the scope of the concept of diplomatic protection as that is understood in current international law. The United Kingdom considers that the provisions of draft article 8 are *lex ferenda*. Whether the United Kingdom would exceptionally, for example on humanitarian grounds, be prepared to make representations or take other action on behalf of stateless persons or refugees would depend on the circumstances of the case and would be in its own discretion, but it would not *stricto sensu* be an exercise of diplomatic protection. In any event, any such representations would not be conclusive or indicative of the status of the individual as a refugee or national of the United Kingdom or the prospect of such status being granted.

(*See comments on draft articles 2, 3 and 15.*)

Chapter III. Legal persons

Draft article 9 — State of nationality of a corporation

United Kingdom of Great Britain and Northern Ireland

Draft article 9 appears to introduce a new requirement for the exercise of diplomatic protection on behalf of a corporation: the existence of another connecting factor, additional to the place of incorporation. No such requirement exists under customary international law. The International Court of Justice in the *Barcelona Traction* case found that customary international law did not require a "genuine connection" between the State and the corporation for the State to exercise diplomatic protection in respect of the corporation. Moreover, the United Kingdom concurs that the concept of "genuine connection" advanced by the International Court of Justice in relation to natural persons in the *Nottebohm* case has no application in the realm of diplomatic protection of corporations. In determining whether to exercise the right of diplomatic protection, the United Kingdom may consider whether the company has in fact a real and substantial relationship with the United Kingdom. However, this is as a matter of policy and not the result of any legal requirement.

Draft article 10 — Continuous nationality of a corporation

United Kingdom of Great Britain and Northern Ireland

With regard to protection in situations where a corporation has ceased to exist, as provided for in draft articles 10, paragraph 2, and 11, subparagraph (a), we see little basis for distinguishing the State which may exercise protection in terms of whether the corporation has ceased to exist as a result of the injury. In general, where a company has ceased to exist for whatever reason, the State of incorporation may have little incentive to protect the capital of shareholders that are not its nationals, while the State of nationality of the shareholders will usually have a stronger interest in doing so.

Draft article 11 — Protection of shareholders

United Kingdom of Great Britain and Northern Ireland

The United Kingdom broadly supports draft articles 11 and 12 regulating the protection of shareholders in a corporation. As reflected in the views of the majority in the *Barcelona Traction* case, international law recognizes two exceptions to the general rule that the State of nationality of a shareholder does not possess a separate right to exercise diplomatic protection: first, when the corporation is defunct; and second, where the State of incorporation itself causes the injury.

Draft article 11 contemplates the possibility that multiple claims may emerge based on the existence of shareholders of several nationalities, thus entitling several States to exercise diplomatic protection. Where the United Kingdom may be entitled to make such a claim, we would, as a matter of practice rather than law, normally seek to do so in concert with other States. We may also refrain from making representations unless the States whose nationals hold the bulk of the share capital will support the United Kingdom in making representations. More generally, we urge the Commission to give greater consideration to situations involving multiple claims, including the need to coordinate claims.

Draft article 11 is restricted to the interests of a shareholder in the corporation, based on the clear intention of the International Court of Justice that the decision in the *Barcelona Traction* case was to apply only to corporations with limited liability whose capital was represented by shares. Consideration should be given to the interests of a corporation's investors other than its shareholders, such as debenture holders, nominees and trustees. Our claims rules (see annex) permit the United Kingdom to intervene where a United Kingdom national has an interest in a company, whether as a shareholder or otherwise.

Subparagraph (a)

United Kingdom of Great Britain and Northern Ireland

As we have observed, the United Kingdom agrees that the State of nationality of a shareholder may intervene on behalf of the shareholder where the corporation is defunct. However, we are concerned that the requirement that the claim be unrelated to the reason that the corporation has been rendered defunct narrows unduly the exception acknowledged in the *Barcelona Traction* case. The right of the State of

nationality of the shareholders should not be contingent upon why or how the corporation ceased to exist.

(*See comments on draft article 10.*)

Subparagraph (b)

Belgium

Belgium takes the view that the restrictive condition imposed on the diplomatic protection of shareholders, whereby the incorporation of the corporation under the law of the State responsible for causing injury is required by the latter as a precondition for doing business there, does not reflect a rule of customary international law. This condition should therefore be removed.

United Kingdom of Great Britain and Northern Ireland

The United Kingdom considers that the right of the State of nationality of the shareholders to exercise protection should be allowed irrespective of the reasons for incorporation in the State of incorporation. For example, our own claims rules (see annex) provide that where a British national is a shareholder in a corporation incorporated elsewhere and the State of incorporation injures the corporation, the United Kingdom may intervene to protect the interests of the British shareholder. Thus, in our view, draft article 11, subparagraph (b), is unduly restrictive.

Draft article 12 — Direct injury to shareholders

United Kingdom of Great Britain and Northern Ireland

(*See comments on draft article 11.*)

Draft article 13 — Other legal persons

United Kingdom of Great Britain and Northern Ireland

We consider this to be a proposal for the development of the law relating to diplomatic protection since accepted principles of customary international law are currently restricted to consideration of the nationality of corporations. Many forms of entity are not currently considered to have separate legal personality within the United Kingdom legal system. The previous practice of the United Kingdom, at least in relation to firms, partnerships and associations, has been to base nationality on the nationality of the individuals or partners creating the legal entity. The United Kingdom supports clarification of the law in this area but considers that further clarification, perhaps in the commentary, would assist.

Part three. Local remedies

Draft article 15 — Category of claims

United Kingdom of Great Britain and Northern Ireland

We support the adoption of the preponderance test since we agree that the emphasis should be on the nature of the injury suffered. However, to the extent that draft article 15 refers to claims on behalf of non-nationals as provided for in draft article 8, we reiterate our previous comments in relation to that article that the right to bring a claim on behalf of a non-national is not reflected in customary international law.

Draft article 16 — Exceptions to the local remedies rule

Subparagraph (a)

United Kingdom of Great Britain and Northern Ireland

Draft article 16, subparagraph (a), elaborates further the notion of an "effective" remedy, with the Commission attempting to resolve the appropriate formulation for when a remedy will be ineffective. In selecting the option of "no reasonable possibility of effective redress", the Commission has developed existing principles. We would interpret this provision as not placing a claimant under an obligation to pursue an appeal to a higher court where it can be established on the facts that such an appeal would have no effect. Similarly, a claimant should not be required to exhaust justice in a State where there is no justice to exhaust. The United Kingdom also considers that obstruction or prejudice to a claimant in the process of exhausting domestic remedies may amount to a denial of justice to that claimant, and it reserves the right to intervene on behalf of a claimant who is our national to secure redress for such injustice. Subject to these comments, we generally support the Commission's development of this area of diplomatic protection.

Subparagraph (b)

United Kingdom of Great Britain and Northern Ireland

We support draft article 16, subparagraph (b), as a codification of the existing rule regarding undue delay.

Subparagraph (c)

United Kingdom of Great Britain and Northern Ireland

The United Kingdom considers that draft article 16, subparagraph (c), represents a proposal for the progressive development of existing customary international law which, at present, contains no need for a voluntary link or territorial connection, or provision for hardship. We suggest that greater clarification is needed, particularly in respect of the required "relevant connection".

Subparagraph (d)

United Kingdom of Great Britain and Northern Ireland

Draft article 16, subparagraph (d), providing for waiver of the requirement that local remedies be exhausted, requires further consideration. Waiver of such a fundamental requirement of customary international law should be express; to allow waiver to be implied in the absence of an express intention to do so is contrary to the current position in international law. Any rule on waivers adopted must be strictly interpreted since it also protects interests other than those of the State waiving the requirement. The Commission may also wish to consider whether there could ever be a waiver in the face of an express treaty obligation to exhaust domestic remedies.

Part four. Miscellaneous provisions

Draft article 17 — Actions or procedures other than diplomatic protection

United Kingdom of Great Britain and Northern Ireland

We support draft article 17 to the extent that it protects existing rights under human rights and other instruments and principles of customary international law. We suggest that further consideration be given to the likelihood of several claims arising in different forums.

(*See comments on draft article 18.*)

Draft article 18 — Special treaty provisions

United Kingdom of Great Britain and Northern Ireland

The United Kingdom approves of the relocation of draft article 18 to the end of the draft articles and considers it an improvement upon previous versions. We consider that clarification in the commentary of the relationship between draft article 18 and draft article 17, which also potentially applies to investment treaties, would be helpful.

Draft article 19 — Ships' crews

Belgium

Belgium takes the view that, as part of a gradually evolving process and in view of the growth of air transport and the increasingly multinational character of cabin crews, an extension of this provision to cover aircraft cabin crews is justified.

United Kingdom of Great Britain and Northern Ireland

The amendments to draft article 19 reflect the decision in the *Saiga* case. Like the Commission, we recognize the existence of practical considerations supporting the bringing of claims by the flag State in the context of the United Nations

Convention on the Law of the Sea. To the extent that this article is controversial in that it may develop existing customary international law, we consider that the article could be omitted from the present draft articles on diplomatic protection since it does not relate to the exercise of diplomatic protection as currently understood in international law.

Annex

United Kingdom of Great Britain and Northern Ireland

Rules applying to international claims

1. Basis of the rules

The UK's rules and the comments have appeared in a number of published works, e.g. the International and Comparative Law Quarterly, Volume 37 (1988) 1006-8. These rules are based on general principles of customary international law.

It may sometimes be permissible and appropriate to make informal representations even where the strict application of the following rules would bar the presentation of a formal claim.

The rules do not deal with the more complex question of what conduct on the part of a State amounts to a breach of international law for which it is responsible. This is covered more fully in Chapter 4.

2. Rules regarding nationality of claimant

Rule 1

HMG will not take up the claim unless the claimant is a United Kingdom national and was so at the date of the injury.

Comment

International law requires that for a claim to be sustainable, the claimant must be a national of the State which is presenting the claim, both at the time when the injury occurred and continuously thereafter up to the date of formal presentation of the claim. In practice, however, it has hitherto been sufficient to prove nationality at the date of the injury and of presentation of the claim (see "Nationality of Claims: British Practice" by I. M. Sinclair. British Year Book of International Law 1950 Vol. XXVII, pp. 125-144).

The term "United Kingdom national" includes:

(a) All British nationals who fall into one of the following categories under the British Nationality Act 1981 (or one of the corresponding categories under earlier legislation):

(i) British citizens;

(ii) British Dependent Territories citizens;

(iii) British Nationals (Overseas);

(iv) British Overseas citizens;

(v) British subjects under Part IV of the Act;

(vi) British protected persons;

(b) Companies incorporated under the law of the United Kingdom or of any territory for which the United Kingdom is internationally responsible.

Rule II

Where the claimant has become or ceases to be a UK national after the date of the injury, HMG may in an appropriate case take up the claim in concert with the government of the country of his former subsequent nationality.

Rule III

Where the claimant is a dual national, HMG may take up his claim (although in certain circumstances it may be appropriate for HMG to do so jointly with the other government entitled to do so). HMG will not normally take up the claim as a UK national if the respondent State is the State of his second nationality, but may do so if the respondent State has, in the circumstances which gave rise to the injury, treated the claimant as a UK national.

Rule IV

HMG may take up the claim of a corporation or other juridical person which is created and regulated by the law of the United Kingdom or of any territory for which HMG are internationally responsible.

Comment

This rule rests on the principle that a juridical person (such as a company, corporation or other association having a legal personality distinct from its members) has the nationality of that country whose law has formally created it, which regulates its constitution and under whose law it can be wound up or dissolved. This principle was endorsed by the International Court of Justice in the Barcelona Traction Case (Belgium v Spain) in 1970. Certain States determine nationality of a corporation by different tests: in place of central administration (siege social) or the place of effective control (to determine which, the residence of the majority of shareholders as well as of the directors may be taken into account). The International Court however said that no one of these tests of "genuine connection" has found general international acceptance.

In determining whether to exercise its right of protection, HMG may consider whether the company has in fact a real and substantial connection with the United Kingdom. (This question and other points arising from Rules IV-VI are discussed further in Mervyn Jones' paper "Claims on behalf of British shareholders in companies having non-British nationality", Library Memo 17793 in AN 4046/91/26/1948.)

Rule V

Where a UK national has an interest, as a shareholder or otherwise, in a company incorporated in another State, and that company is injured by the acts of a third State, HMG may normally take up the claim only in concert with the government of the State in which the company is incorporated. Exceptionally, as where the company is defunct, there may be independent intervention.

Rule VI

Where a UK national has an interest, as a shareholder or otherwise, in a company incorporated in another State and of which it is therefore a national, and that State injures the company, HMG may intervene to protect the interests of that UK national.

Comment

In some cases the State of incorporation of a company does not possess the primary national interest in the company. A company may be created for reasons of legal or economic advantage under the law of one State though nearly all the capital is owned by nationals of another. In such circumstances, the States in which the company is incorporated may have little interest in protecting it, while the State to which the nationals who own the capital belong has considerable interest in so doing. In the Barcelona Traction Case, the International Court of Justice denied the existence under customary international law of an inherent right for the national State of shareholders in a foreign country to exercise diplomatic protection. However, the majority of the Court accepted the existence of a right to protect shareholders in the two cases described in Rules V and VI (when the company is defunct, and where the State in which the company is incorporated, although theoretically the legal protector of the company, itself causes injury to the company).

Where the capital in a foreign company is owned in various proportions by nationals of several States, including the United Kingdom, it is unusual for HMG to make representations unless the States whose nationals hold the bulk of the capital will support them in making representations.

Rule VII

HMG will not normally take over and formally espouse a claim of a UK national against another State until all the legal remedies, if any, available to him/her in the State concerned have been exhausted.

Comment

Failure to exhaust any local remedies will not constitute a bar to a claim if it is clearly established that in the circumstances of the case an appeal to a higher municipal tribunal would have had no effect. Nor is a claimant against another State required to exhaust justice in that State if there is no justice to exhaust.

Rule VIII

If, in exhausting any municipal remedies, the claimant has met with prejudice or obstruction, which are a denial of justice, HMG may intervene on his behalf to secure redress of injustice.

Rule IX

HMG will not take up a claim if there has been undue delay in its presentation to them unless the delay results from causes outside the control of the claimant, but no time limits are fixed and they are subject to equitable rather than legal definition.

3. Rule regarding remedies under a treaty

Rule X

Where an express provision in any treaty is inconsistent with one or more of Rules I to IX, the terms of the treaty will, to the extent of the inconsistency, prevail. In case of ambiguity, the terms of any treaty or international agreement will be interpreted according to these rules and other rules of international law.

4. Rule regarding devolution of claims

Rule XI

Where the claimant has died since the date of injury to him or his property, his personal representatives may seek to obtain relief or compensation for the injury on behalf of his estate. Such a claim is not to be confused with a claim by a dependent of a deceased person for damages for his death.

Comment

Where the personal representatives are of a different nationality from that of the original claimant, the rules set out above would probably be applied as if it were a single claimant who had changed his/her national status.